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No. 90-35

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

HILARY FORETICH,
Petitioner,

v.

LIFETIME CABLE and BRITISH BROADCASTING CORP.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY MEMORANDUM

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Respondents press one basic argument throughout their Brief in Opposition. They maintain that the court of appeals in this action "concluded, quite unremarkably, that this petitioner had not made the requisite showing to justify the injunctive remedy it sought." Br. in Opp. 7 (footnote omitted). Respondents cite the familiar evidentiary standard required for issuance of a preliminary injunction and assert that this case involves nothing more than a court of appeals' decision to reverse a district court's order because the order lacked adequate evidentiary support. The argument is plainly and demon-

strably wrong, and respondents' reliance on it is severely misplaced.

Contrary to respondents' view, this case does not involve a preliminary injunction. At this juncture, this case relates exclusively to the district court's issuance of a *temporary restraining order*.[1] And because a temporary restraining order, by its nature, merely preserves the status quo until more searching consideration can be given, and because it lasts for only a brief and defined period, the "requisite showing" for such an order is substantially different from the standard applied to the issuance of other, more enduring injunctive relief. *See, e.g., Sampson v. Murray*, 415 U.S. 61, 85-86 (1974); *Backo v. Local 281, United Brotherhood of Carpenters and Joiners of America*, 438 F.2d 176, 180 (2d Cir. 1970), *cert. denied*, 404 U.S. 858 (1971). *See generally* 7 J. Moore, J. Lucas and K. Sinclair, Jr., Moore's Federal Practice ¶ 65.05, at 65-100 (2d ed. 1990) ("A temporary restraining order is a temporary order entered . . . upon a summary showing of its necessity in order to prevent immediate and irreparable injury, pending a fuller hearing and determination of the rights of the parties or the court's jurisdiction upon a motion for a preliminary in-

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[1] *See* App. B, pp. 3a-4a (emphasis added) ("Upon consideration of the plaintiffs' application for a *temporary restraining order* . . . it is . . . ordered that the defendants are restrained from airing, licensing or distributing the scenes of the program, *Hilary in Hiding*, involving the minor's description of alleged sexual abuse *until April 17, 1990, . . . when the Court will hold a preliminary injunction hearing on this matter.*") *See also* App. C, pp. 31a-32a (emphasis added) ("I'll tell you what I'm going to do here. I believe I don't have enough data or information, and I will—I don't know. Because I think you do raise a good issue of the question of how are we going to label whatever this cause of action. But I do believe there is enough here to issue a TRO, and I'm going to issue a TRO for 10 days, and I'll set it for trial. . . . I believe that I am compelled to give the child's interests the higher priority here and to put a *TRO* on it at this time *until this matter can be further fully explored.*")

junction.") There is no requirement that the plaintiff prove likelihood of success on the merits or make a substantial evidentiary showing.

On the basis of evidence that was contained in the record—notably, the actual videotape of Hilary that was to be broadcast nationwide just a few hours later—the district court acted well within its discretion in concluding, for the limited purpose of issuing a temporary restraining order, that Hilary would suffer profound and irreparable harm if approximately three-and-a-half minutes of videotape were aired that evening and over the following week. The district court expressly acknowledged the evidentiary limitations under which it was acting, and the district judge scheduled a plenary evidentiary hearing to follow on April 17, 1990, at which time the issue of a preliminary injunction could be taken up. *See* App. B, p. 4a; App. C, pp. 33a-34a.

The district court's order in this case is closely akin to what the district court did in *United States v. New York Times Co.*, 328 F. Supp. 324 (S.D.N.Y. 1971)—the "Pentagon Papers" case. There the court issued a temporary restraining order lasting two days, "because in my opinion any temporary harm that may result from not publishing during the pendency of the application for a preliminary injunction is far outweighed by the irreparable harm that could be done to the interests of the United States Government if it should ultimately prevail." 328 F. Supp. at 325. The district court ultimately ruled that publication could not be barred, but it continued its temporary restraining order "until such time during the day as the Government may seek a stay from a Judge of the Court of Appeals for the Second Circuit." 328 F. Supp. at 331. The government did seek such a stay, and it was granted by the court of appeals, thereby further enabling the appellate court to review the merits while preserving the status quo. *See United States v. New York Times Co.*, 444 F.2d 544 (2d Cir. 1971).

This course of action was directly criticized by only one member of this Court when the case was brought before it. *See New York Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Brennan, J., concurring). In his opinion Justice Brennan expressly recognized that there do exist circumstances—where there is an asserted interest in the *form* of expression, as opposed to an attempt to suppress an idea itself—where injunctions against publications may properly issue. *See id.* at 726 n.*.

Moreover, nothing that the court of appeals did is consistent with the respondents' assertion that it was simply holding that "petitioner had not met its burden." Br. in Opp. 16. The court of appeals did not view the respondents as appealing from the district court's order as if it were a preliminary injunction. Indeed, temporary restraining orders are not ordinarily appealable. *See, e.g., Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1977). *See generally* 7 J. Moore, J. Lucas and K. Sinclair, Jr., Moore's Federal Practice, pt. 2 ¶ 65.07, at 65-110 (2d ed. 1990). Consequently, the court issued a writ of mandamus. The court of appeals did not make any explicit determination as to the adequacy of the evidentiary support for the district court's actions; the court of appeals did not even have the district court record before it. The court of appeals issued an extraordinary writ of mandamus, on the sole ground that "[t]he district court's temporary restraining order constitutes a prior restraint . . . ." App. A, p. 1a. And on the basis of this bare legal conclusion, the court of appeals vacated the restraining order because it concluded that petitioner's *only* redress was "in [a] legal action[] that do[es] not require a prior restraint in derogation of the First Amendment." *Id.*

Contrary to respondents' efforts to trivialize the nature of this dispute and reduce it to a squabble over the sufficiency of particular evidence, the true holding of the

court of appeals is unmistakable. For the first time, and without support from this Court's precedents, the court of appeals declared that *any* prior restraint on a television broadcast of a film, no matter how carefully tailored or brief, violates the constitutional protection for free speech and freedom of the press. This declaration goes far beyond the proper contours of the prior restraint doctrine.

CONCLUSION

For the reasons stated in our petition and in this reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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